Accuride Division of Standard Precision, Inc. *and* J. Trinidad Ramirez *and* Theresa Recinos. Cases 31–CA–18605 and 31–CA–18691

May 14, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On September 16, 1992, Administrative Law Judge William J. Pannier III issued the attached decision. Charging Party Recinos, appearing pro se, filed exceptions and supporting statements in the form of a letter requesting an ''appeal.''[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of Charging Party Recinos' exceptions and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] No party has objected to the form of the exceptions.

[2] Charging Party Recinos has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge, early in his decision, inadvertently stated that the election was held on October 23, 1990. The judge later stated correctly that the election was held on October 12, 1990, and that the Certification of Results of Election issued October 23, 1990. We correct the error.

Gary Freelen Ellison, for the General Counsel.
Fred Long (The American Consulting Group, Inc.), of Los Gatos, California, and *Erick J. Becker*, of Costa Mesa, California, for the Respondent.
Trinidad Ramirez, of Bloomington, California, and *Theresa Recinos*, of Hesperin, California, appearing pro se.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Los Angeles, California, on February 6 and 7, and on February 12 and 13, 1992. On April 26, 1991, the Regional Director for Region 31 of the National Labor Relations Board (the Board), issued an order consolidating cases, consolidated amended complaint and notice of hearing, consolidating a complaint and notice of hearing issued on March 19, 1991, based upon an unfair labor practice charge filed in Case 31–CA–18605 on January 9, 1991, with an unfair labor practice charge filed in Case 31–CA–18691 on March 4, 1991, and alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs that were filed, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Accuride Division of Standard Precision, Inc. (Respondent), has been a California corporation with an office and place of business in Ontario, California, where it engages in the manufacture of metal slides for desks and office-type furniture requiring sliding doors. In the course and conduct of those operations, Respondent annually sells and ships goods or services valued in excess of $50,000 directly to customers or business enterprises located outside the State of California. Therefore, I conclude, as admitted in the answer to consolidated amended complaint, that at all times material Respondent has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The parties stipulated that Respondent opened its Ontario plant in 1987. Since then Respondent has continuously manufactured there a highly specialized door slide for furniture and computer parts, as well as for cabinets, by cutting raw material into various lengths and welding brackets which are then galvanized and assembled into the slides that Respondent ships. To conduct those operations, Respondent's Ontario production employees work in three areas: manufacturing, galvanizing, and assembly. The assembly area, in turn, is subdivided into ball retainer, rail, D-pak, and assembly line departments. Leadmen oversee operations in each of those departments and those leadmen report to the assembly supervisor who is responsible for all operations in the assembly area. Until late October 1990 that individual had been Jose Jiminez. At that time he became supervisor of the accessories department and was succeeded as assembly supervisor by Frank Olvera, previously quality assurance supervisor at Ontario. Olvera still served as supervisor of the assembly area at the time of the hearing. Further, when Olvera replaced Jiminez, or shortly thereafter, Alfredo Gallegos became leadman for the ball retainer department, replacing Danilo Guerra who had previously been the leadman for that department.

During July 1990 one of the employees, Carmen L. Ramirez, telephoned a representative of Teamsters, Chauffeurs, Warehousemen, Industrial & Allied Workers, Local 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union). That telephone call set in motion an organizing campaign among Respondent's Ontario production, maintenance, and craft employees. It led to the filing of a petition for election on August 27, 1990, and culminated in an election on October 23, 1990, during which 184 of the approximately 227 eligible employees voted against representation by the Union.

In response to the Union's campaign, a meeting of Respondent's supervisors and managers was conducted in late August. They were instructed during that meeting about conduct in which they could and could not engage during the preelection period. Those instructions were reinforced by distribution of a three-page ''LIST OF DO'S AND DONT'S [sic] FOR SUPERVISORS,'' enumerating permissible and objectionable conduct. Thereafter, four or five additional meetings of supervisors were conducted during the preelection period by Lupe Cruz, a consultant with American Consulting Group, which Respondent had retained to conduct its campaign.

In addition, Cruz conducted periodic meetings—at intervals of 1 week to 10 days—of eligible employees during the approximately 8-week interval between the petition's filing and the election. Given the number of employees in the proposed bargaining unit, and the need to maintain continuing operations, for each date on which Cruz met with employees, the latter were divided into groups of between 12 and 20 employees. Cruz then held a series of meetings, one with each group of employees each day, at which the same message was conveyed to employees in each group. Given the need to speak to several groups of employees, the time available to meet with each group was limited. As a result, if time remained after Cruz delivered his prepared remarks to a group, employees in that group could ask questions and make observations about Cruz' message.

The General Counsel alleges that, in the course of addressing Respondent's employees, Cruz ''impliedly promised an employee improved terms and conditions of employment if . . . the Union[] lost the forthcoming election'' and, further, ''threatened an employee with loss of benefits by stating that if the Union won the election, Respondent would start negotiations at the very bottom with regard to wages and benefits.'' To support that allegation, the General Counsel presented two witnesses: Alfredo Garcia, a former employee of Respondent, and Theresa Recinos, formerly an assembly operator who had begun working for Respondent on December 1, 1987, at its Santa Fe Springs, California plant and who had transferred to the Ontario plant in approximately August 1988.

Recinos also testified concerning another of the complaint's allegations: that in approximately late September 1990, then-Assembly Supervisor Jiminez had unlawfully interrogated her concerning her union sympathies, had created the impression that her union or other protected activities were under surveillance, and had threatened her with unspecified reprisals by stating that Respondent was going to get union supporters like animals. According to Recinos, when she turned around from her machine one day, she discovered Jiminez standing behind her. She testified that after exchanging greetings and ''a small work discussion,'' he had asked what she thought of the Union and, when she inquired why he was ''asking me that question,'' had remarked that one of the Union's representatives was riding in a new car bought with employees' union dues.

Then, testified Recinos, Jiminez asked again what she thought of the Union and what her husband, also an employee of Respondent, thought of it. According to Recinos, she ''answered him, 'Nothing,''' and Jiminez then asked how much per hour she and her husband earned and, ''How long we could handle a strike for, because it's difficult for the union to win,'' adding, ''I feel sorry about ones who have a house, new car, because the company . . . wants to know who is with the union.'' Recinos testified that when she inquired concerning how Respondent would learn the identities of those employees, Jiminez had replied ''that people were being sent to the union meetings to find out who was in favor of the union,'' and that, ''It's very easy because election day, they have to be there representing the union.'' At that point, testified Recinos, Jiminez snapped his fingers and said, ''We're going to get them like animals.'' He then left in response to a call over the public address speaker.

Recinos testified that she mentioned her conversation with Jiminez during a subsequent preelection meeting conducted by Cruz. In fact, Cruz acknowledged that, during a preelection meeting at which he had assured employees that supervisors could not ask them their opinions of the Union, Recinos ''raised her hand and said something along the lines—I don't know the exact words, 'Well, it happened to me.''' Recinos further testified that she had made remarks at other preelection meetings, either disputing assertions made by Cruz during his prepared remarks or making statements contrary to Respondent's position that the employees did not need representation.

That testimony is significant for the General Counsel, since Recinos had been, at best, a bit player in the organizing campaign. She attended periodic meetings of employees conducted by the Union. However, other than being one of the employees who signed cards authorizing representation by the Union, there is no evidence that Recinos had participated actively in what had occurred at the Union's meetings. Moreover, while she spoke favorably about the Union to some other employees while at work, Recinos conceded that she had done so outside of the presence of supervisors and managers. Indeed, as disclosed by her testimony describing her above-described indifferent response to Jiminez's asserted inquiries, Recinos tried to make certain that Respondent's supervisors and managers would not learn of her union sympathies. In fact, she testified that when asked by Carmen Rodriguez to be a union observer during the election, she had declined because she feared reprisals if Respondent ascertained that she supported the Union.

Of the 220 eligible employees who cast ballots during the election on October 12, 1990, only 36 of them cast votes for the Union. No objections to the election were filed and the Certification of Results of Election issued on October 23, 1990. So far as the evidence discloses, consistent with those election results, all union activity ceased thereafter among Respondent's employees. One other postelection event of significance occurred in late October or early November 1990: Jiminez was transferred to supervisor of the accessories department and Olvera replaced him as assembly supervisor.

Since Respondent evaluates all employees' performance for possible merit wage increases in June and December of each year, Olvera became the supervisor responsible for performing the assembly area employees' evaluations, including that of Recinos, during December 1990. There are two aspects to those evaluations. On a printed form appear categories labeled quality of work, quantity of work, job knowledge, attitude, and dependability. For each category an employee's performance is rated for the preceding 6 months as having fallen in one of five possible grades: outstanding, good, satisfactory, improvement needed, and unsatisfactory.

In addition, the form contains sections summarizing attendance and warning notices received by the rated employee.

Recinos received the poorest rating given by Olvera in December 1990, with her quality of work being graded as satisfactory, but with improvement needed being the grade in each of the four other categories. As a consequence of that rating she was denied the merit increase that, Respondent concedes, she would otherwise have received. The General Counsel alleges that deprivation of the merit increase had been motivated by Recinos's union or other protected concerted activity, thereby violating Section 8(a)(3) and (1) of the Act. In addition to the testimony pertaining to Jiminez' statements to Recinos and to her asserted comments during Cruz's meetings, the General Counsel points for support of that allegation to certain other facts which are not disputed: never before had Recinos been rated so poorly and no prior warnings or other comments had been made to her by Olvera regarding her asserted deficiencies.

The General Counsel does not rely exclusively upon circumstantial evidence to support the allegation that deprivation of Recinos' merit increase had resulted from an unlawfully motivated adverse performance appraisal. The complaint alleges that Olvera had created the impression that her union or protected concerted activities were under surveillance. That allegation is based upon Recinos' testimony that, during December 1990, Olvera

> was looking at me too much, hiding at the machines. What I was never able to understand – why he had to continue looking at me when I already punched to go out, it was almost not work time anymore. He was looking at me suspiciously, as if I were a criminal.

The second aspect of the performance evaluation process is an employee-supervisor meeting during which the employee's performance is reviewed and the written evaluation is explained. Comments attributed to Olvera by Recinos during the December 1990 evaluation meeting supply the final element in the General Counsel's argument that her merit increase had been denied unlawfully. She testified that, during this meeting, when she asked why she had received adverse marks, Olvera had said

> that he had put them down because of my behavior, negative behavior, towards the company and that my review was twenty-five cents at that time – twenty-four cents wasn't going to be given to me because I had been involved in union problems.

She further testified that when she ''asked him how he knew all that about me, Olvera answered that one person he had complete trust in had told him all of that about me—that I was in the union,'' and, moreover, ''That the company people knew that I liked good comments that had been said about the union and that I had been organizing the union.'' When, testified Recinos, she asked to look at her personnel file, Olvera had responded, ''There's nothing in your file. You're clean, but you're being accused of being in with the union.''

Both Recinos and Olvera testified that, during that performance evaluation meeting, the latter had promised to again review Recinos's performance in another month. In fact, on January 14, 1991, Olvera met with Recinos and, showing her the printed form on which he had upgraded her job knowledge and attitude grades to satisfactory, informed her that she would receive the increase denied her during the preceding month. According to Recinos, Olvera also said ''that he was hoping that that which had been done to me about giving me my raise would act as an experience for me not to talk about anything or to get into problems,'' and that her initial rating ''had been done because of my problem with the union.''

The complaint's final allegation is that Recinos had been laid off on February 8, 1991, and refused reinstatement thereafter, because of her union or other protected concerted activities. During 1990's final calendar quarter Respondent began experiencing a loss of business that continued through January 1991. As a result, Respondent decided that it was necessary to lay off 12 day-shift and 12 night-shift employees on February 8, 1991. The General Counsel does not challenge the legitimacy of Respondent's motivation for these decisions.

Selection of the specific employees to be laid off was delegated to the supervisors for each area. To guide those selections, they were instructed to first look to employees who performance had been unsatisfactory, then to employees with attendance problems and, lastly, to seniority. Respondent admits that because of Recinos's most recent performance evaluation, even as upgraded during the preceding month, she had been selected for layoff as an unsatisfactorily performing employee. In essence, the General Counsel contends that inasmuch as that evaluation had been unlawfully adverse, the layoff motivated exclusively by it had been unlawful, as well.

Butressing that contention is testimony by Recinos concerning a meeting with then interim Ontario Human Resources Manager Ted Olea following the layoff's announcement to day-shift employees, including Recinos. Olea acknowledged that he had made himself available to discuss with each laid-off employee the basis for his/her selection and that Recinos had been one employee who had met with him. During her meeting, testified Recinos, when Olea had said that her selection had been based on her performance evaluation, she had

> interrupted him, and I told him that it was because of the union. He said, ''Yes, because of your negative conduct toward the company.'' So then I asked him again, ''So, then it was because of the union?'' He told me, ''Yes. I am sorry.''
>
> So then I asked, ''What possibility was there – would I have if the company would need people again?'' He answered, ''None.'' They would never call me again, but that if it was done, I was going to be one of the last.

In fact, while some of the laid-off employees have been recalled, Recinos has not been one of them.

To be sure, if the foregoing sequence of events actually occurred, the General Counsel has established that Recinos had been unlawfully rated, denied a merit increase and laid off. However, although Olea acknowledged that, during his postlayoff announcement meeting with Recinos, she had mentioned, ''A discussion wherein Olvera asked her what did she have against the company, and Theresa said that she

felt that, at that point, he was talking about the union,'' Olea testified that he had cut her off, saying, ''This is not a discussion about this.'' He denied having discussed the subject further and having said anything to her about her engaging in union activities.

Similarly, Olvera denied that he had mentioned the Union during the performance upgrade meeting with Recinos on January 14, 1991. Furthermore, he denied that, during his performance evaluation meeting with her 1 month earlier, the subject of the Union had arisen and, moreover, testified that he had not told Recinos that he did not want a union sympathizer in his work unit. Affirmatively, he testified that during the December evaluation meeting, he had allowed Recinos to look at the grades that he had placed on the printed form and, then, had explained in detail his reasons for having placed each grade in each category. Although Recinos denied specifically that Olvera had gone over the ratings on the form with her, category by category, she testified that the meeting had lasted ''[f]orty minutes,'' and its difficult to ascertain how it could have lasted so long had Olvera not discussed the grades on the evaluation.

As to the particular reasons for the grade recorded in each category, Olvera testified that while working in the ball retainer department, the usual department to which she had been assigned, Recinos' order would take longer to produce than they should have taken, and that it took coworkers to produce, because she would leave her work ''station unattended to go to the rest room or the like.'' In addition, although there was conflicting testimony regarding the frequency with which Recinos and other ball retainer department employees were assigned to work on the assembly line, and the amount of time spent working in that department each week, there is no dispute that she did work on the assembly line with some regularity. During those times, testified Olvera, Recinos worked as part of a crew, but was not able to maintain the speed needed, and the speed of the rest of the crew, with the result that she too frequently removed parts from the line so that she would not be overwhelmed with parts needing work. As a result of these performance deficiencies, testified Olvera, he had assigned an improvement needed grade for her quantity of work and had explained to her the foregoing reasons for having done so.

As for the category job knowledge, he testified that, in contrast to other employees when assigned to work on the assembly line, Recinos never went ''to check the drawing board'' before beginning work, thereby depriving herself of the opportunity ''to enhance [her] job knowledge or product knowledge of what it is you're making and what it is you're doing—to learn about our products.'' According to Olvera, when working on the assembly line, Recinos also lacked the familiarity with the presses that other operators possessed, with the result that she was not sufficiently proficient in operating them and could not keep up with the rest of the crew.

With respect to the improvement needed grade for attitude, Olvera testified that he had two complaints about Recinos and that he had voiced both to her during the December evaluation meeting. First, he felt that there had been excessive friction among the ball retainer department employees and that it had been engendering disharmony. Second, he testified that he felt, and told Recinos, that she had disregarded his requests that she actively participate in festive gatherings of employees that Respondent had periodically organized during worktime to promote positiveness among the workers: ''there were several of these festive gatherings, and, I believe, on a few occasions, she actually walked right by me . . . and headed for the exit,'' thereby being positioned ''a good distance away from the gathering that we had,'' to exit as soon as it was officially quitting time.

Finally, Olvera testified that he had marked improvement needed for dependability because Recinos had a total of 7.0 points under Respondent's attendance standards: ''as she was aware, she was over the verbal warning level, and I pointed out to her that one more point and she would be at the first written warning level.''

Olvera agreed that, during the evaluation meeting, he had promised that he would again evaluate Recinos in another month and, in fact, he did so. He testified that, ''I try to be a motivator and I had seen some improvement, a slight improvement in her attitude.'' That is, testified Olvera, ''I felt she was doing her part to try to display more of a—as far as with the other ladies,'' and, ''The friction had definitely been dying down.'' He further testified that he had observed that in the area of job knowledge, ''it looked like she was trying to do a little more with the product knowledge or learning more about the product knowledge.'' Nevertheless, testified Olvera, ''she definitely still needed to pick up her speed as far as working on the line'' and ''her attendance—the record was still at the same level.'' As a result, he testified, ''I decided that it would be reasonable to grant her the merit increase, hoping that she would continue to improve her overall performance.''

Olvera testified that he did not see continued improvement in Recinos' performance after she had been granted the merit increase in January 1991. Thus, when he had been obliged during the following month to select employees for layoff, he regarded her performance as continuing to be unsatisfactory and, accordingly, within the first above-enumerated category for layoff selection. She was not alone. Also selected were Silvia Eseberra, who had two improvement needed marks on her most recent appraisal; Rosalba Martinez, who had three improvement needed marks on her most recent appraisal; and, James Claudio, who had two improvement-needed marks on his most recent appraisal. Significantly, while Martinez and Claudio had accumulated higher attendance warning notice points than Recinos—8.5 and 9.5 points, respectively—Eseberra had only 2.0 such points.

III. DISCUSSION

Unlawful motivation is not erased by the mere existence of a legitimate reason for choosing an employee for layoff. If that legitimate reason is merely a pretext designed to conceal unlawful motivation, or if a respondent fails to show that it would have made the layoff selection for a legitimate reason absent an employee's union or protected concerted activity, then there would be a violation of the Act. Here, however, to establish the existence of unlawful motivation the General Counsel relies almost exclusively upon the testimony of Garcia and, more particularly, upon that of Recinos. In the final analysis, that reliance is misplaced.

The General Counsel's case began to unravel in connection with those two individuals' testimony regarding what Cruz had said during the preelection meetings. Garcia had been one of the employees who had been selected for layoff on February 8, 1991. Before that, he had once been a

leadman, but had been demoted by Respondent. He admitted that he was not happy about having been demoted or laid off. As an objective proposition, adverse, though lawful, personnel action can lead an individual to tailor his testimony to injure the position of the employer that administered it. See, e.g., *Douglas Aircraft Co.*, 307 NLRB 536 (1992). As he testified that appeared to be the course that Garcia was pursuing. Indeed, his disdain for Respondent surfaced expressly when, in the course of describing purported remarks by Cruz, Garcia testified, ''We're going to work the same as always, *he would say hypocritically*, as a family.'' (Emphasis added.) I do not credit Garcia's descriptions of Cruz' statements during the preelection meetings.

That left Recinos as the lone witness supporting the General Counsel's allegations that, during those preelection meetings, Cruz had impliedly promised improvements if the employees rejected the Union's representation and had threatened to start at the very bottom in any negotiations concerning wages and benefits. Before discussing her testimony, it is worth mentioning specifically that, in the circumstances, it is objectively unlikely that Cruz would have made statements to employees that violated the Act. As shown by the abovementioned meetings with supervisors and managers, as well as by the three-pages of ''DO'S AND DONT'S'' distributed to them, Respondent had taken steps to ensure that the election would be conducted in an atmosphere free of objectionable, much less unlawful, conduct. American Consulting Group had been retained to aid Respondent in its campaign and Cruz, its consultant, had a relatively extensive background in these matters, both as a union official and as a representative of employers. Given those facts, it seems unlikely that he would have cavalierly obliterated all Respondent's efforts for an unobjectionable campaign by baldly making unlawful remarks.

Of course, despite his experience, Cruz could have done so inadvertently. If so, that was not reliably demonstrated by the testimony of Recinos. In fact, during direct-examination she testified to neither the promise nor the threat alleged in the complaint. Rather, in generalized testimony, unspecific as to particular meeting, she testified that Cruz made ''many threats,'' saying ''that there was a possibility that, if the union were to win, the plant could be closed or cut benefits, hours, strikes.'' As it turned out this deficiency in the General Counsel's proof was corrected during cross-examination when Recinos was taken through Cruz' meetings, one by one. In the course of responding to those questions, she did testify that during the second meeting Cruz had said that if the Union won the election, ''They were going to negotiate from below,'' that is, ''From minimum wage,'' and, further, ''That if the union were to lose, there were going to be many changes, good changes.''

The subject of changes, testified Recinos, had been discussed in two subsequent meetings: ''That if the union lost there were going to be changes,'' and, in the final preelection meeting, ''That we had very good benefits, paid days, sick days, that if the union lost, there were also going to be a lot of changes, that we're going to see them.'' Recinos also testified that at that last meeting, Cruz had renewed discussion of Respondent's negotiating posture should the Union win the election:

> That if the union won, everything was going to change because everything was going to go downhill.
>
> . . . .
>
> Because everything was going to go downhill, it was—they were going to sit down and negotiate and the company was going to take away some—some benefits that we had.

Her testimony, however, was not convincingly advanced. As questioning progressed, it became increasingly obvious that Recinos had no memory whatsoever concerning what Cruz had actually said. Instead, it was evident that she was simply making up and attributing statements to him that conformed to her own preconceptions and beliefs about Respondent's attitude toward the Union and, also, that fortified her own opinion as to why she had been poorly evaluated and laid off. For example, she testified that Cruz had conducted meetings once a week. But, she went on to describe 13 such meetings during the but 8-week period that had elapsed between the filing of the petition and the election. She accused Cruz of having made ''many threats,'' including possible plant closure and loss of employment. Yet, no allegations of such assertedly numerous threats are included in the complaint as a result of her descriptions of Cruz' statements to the General Counsel during the precomplaint investigation. Of greater consequence, save for the unreliable Garcia, not one other employee corroborated Recinos's descriptions of repeated offending statements by Cruz. Yet, had he made them, especially if done so during the course of his prepared remarks to each group of employees, it seems unlikely that they would not have been heard by other employees, given the fact that Cruz conducted a total of approximately 50 meetings with small groups of employees from a complement of over 200 eligible employees.

Her unreliability was further demonstrated by Recinos' testimony pertaining to other allegations of the complaint. For example, as described above, she testified that, prior to evaluating her performance in December 1990, Olvera had been ''looking at me too much, hiding at the machines.'' Indeed, based upon that testimony, the General Counsel contends that Olvera's asserted conduct had constituted surveillance of Recinos's union or statutorily protected activity: ''as the date of Recinos' performance review neared, it was clear in Recinos' mind that Olvera[] . . . was observing more than the mere job performance of an employee.'' Yet, that argument, as well as the impression of Olvera's conduct that Recinos appeared to be trying to create when she testified, is specifically contradicted by her own prehearing affidavit in which she stated, ''Around the beginning of December 1990, I noted that Olvera was looking at me, watching me a little more closely and frequently. I didn't put any importance to that because the supervisors always did that around the time of the review.''

There is simply no evidence that union activity had been continued by any of Respondent's employees, including Recinos, once the representation proceedings had been completed in October 1990. Neither is there evidence of any other type of protected concerted activity having been pursued by employees into December 1990. Further, there is no evidence that Recinos, particularly, had engaged in any union or protected activity following the election. Nor, for that

matter, is there evidence upon which to base an inference that Respondent would likely have believed her to have been engaging in any such activity. Given the absence of such evidence, there is no basis for concluding that Recinos could have genuinely believed that union or other statutorily protected activity was under surveillance during December 1990. In any event, a preponderance of the credible evidence fails to show that Respondent actually did so.

In arguing that Recinos had been discriminatorily denied a merit pay increase and, later, laid off, the General Counsel relies heavily on her descriptions of statements that she had assertedly made during Cruz' preelection meetings as evidence of protected activity about which Respondent had knowledge. However, while she described repeated remarks that she had made to Cruz, contesting and challenging assertions that he was making during those preelection meetings, there was no credible corroboration by other employees for her descriptions of those repeated remarks. More significantly, as described above, Recinos had taken pains to conceal from Respondent that she was supporting the Union, declining even to serve as the Union's observer during the election. Given her care in that respect, it seems most improbable that she would have engaged in the diametrically opposite conduct of publicly making statements to Respondent's consultant that would have shown clearly that she was sympathetic to the Union or, at least, that she did not share Respondent's views about unionization.

Turning to another area, Recinos' description of Jiminez' statements, during their above-described conversation at her work station, tends to seem facially believable. After all, Cruz acknowledged that Recinos later reported that Jiminez had questioned her union sympathies and, thereafter, she repeated that report in Jiminez' presence. However, Jiminez testified that there had been only a single private conversation with her about the Union. That conversation, testified Jiminez, had consisted solely of Recinos questioning the effect of the election's outcome on employees and, moreover, whether employees were obliged to vote in the election. He testified that he had referred her to Respondent's literature with regard to her first question, assuring her that ''everything was going to be normal, as usual'' after the election, and, as to her second question, had said only, ''Well, you're not obliged to vote, but what single vote couldn't make a difference for either side.''

As Recinos testified, moreover, it became increasingly obvious that she harbored great bitterness toward Jiminez, referring to him as a ''hypocrite-traitor.'' So bitter toward him was she that initially—and, as it turned out, falsely—she denied that she and her family had at one time socialized with Jiminez and his family. But, subsequently, pictures were produced of the two families socializing during the 1980s. In fact, Recinos ultimately agreed that, for her, the previous friendly relationship had not begun souring until 1989, when she took offense at Jiminez' criticism of her work output at time when she had an injured finger. She referred generally to additional incidents that served to heighten her antipathy toward him. As a result, it is not at all unlikely that she simply took advantage of Cruz' assurance that supervisors could not question employees' union opinions and tried to make trouble with Respondent for Jiminez by accusing him of having done so. She then repeated and embellished that accusation in her affidavit and when she testified so that her case against Respondent would be strengthened.

Certainly, Jiminez' version of their conversation tends to be supported by the fact that one of her admitted questions to Cruz had pertained to whether employees were obliged to vote in the then upcoming representation election: ''Like if someone didn't want it—if I was called to vote and I didn't want to, an example.'' Her admitted concern about that subject with Cruz tends to support a conclusion that she might have been disposed to also ask others, such as Jiminez, about it. More significantly, there is no evidence that, during the course of her reports to Cruz, she had ever mentioned Jiminez' purported statements that Respondent was infiltrating union meetings and intending to retaliate against union sympathizers ''like animals.'' Such statements are significant and, given Recinos' obvious perceptiveness when she testified, it seems unlikely that she would simply have ignored them and not included them in her reports to Cruz, had Jiminez truly uttered them.

It was obvious that Olvera, who had replaced Jiminez as assembly supervisor with little more than a month to go before evaluations were due in December 1990, would have needed to confer with Jiminez to properly evaluate assembly area employees for the full 6-month period that concluded during that month. Indeed, Olvera acknowledged that he had spoken with Jiminez specifically about Recinos, testifying that Jiminez had said that she was ''a slow worker'' and took ''an inordinate amount of'' breaks. Yet, in her seeming haste to tie Jiminez as closely as possible to her evaluation—and thus to connect his purported earlier remarks to her as a union sympathizer against whom Respondent was supposedly disposed to retaliate—she stated in her prehearing affidavit that, during the evaluation meeting, Olvera had said, with reference to the evaluation form, ''that it had been signed by Mr. Jiminez.'' She repeated that assertion when she testified: ''He said to me, 'Mr. Jiminez made your review out, and he signed it.''' However, examination of the evaluation form produced during the hearing, and identified by Recinos as the one that she had signed during the December meeting with Olvera, discloses that it bears the signature of Olvera. At no place on it does Jiminez' signature appear.

At first blush that discrepancy might appear not particularly significant. However, as set forth above, Recinos testified to repeated remarks by Respondent's officials concerning her union support as the reason for her adverse evaluation and layoff. Indeed, according to Recinos, Olvera and, later, Olea virtually fell over themselves making remarks about her union sympathies as the reason for those adverse personnel actions: during the evaluation meeting in December 1990, during the reevaluation meeting in January 1991, and during the meeting that followed the layoff announcement on February 8, 1991. Yet, as described above, there had been initial and ongoing admonitions during the preelection period to Respondent's officials concerning statements that could and could not lawfully be made to employees. Both Olvera and Olea appeared to be intelligent individuals who were sufficiently perceptive to appreciate, against that background of instruction, that they would injure Respondent's interest—and, in turn, their own—by giving voice to admissions of animosity toward the union sympathies of an employee as the reason for personnel action taken against her. Neither Olvera nor Olea appeared so reckless.

In sum, I do not credit Recinos and, consequently, conclude that there is no credible evidence of unlawful statements by Respondent's officials, nor of ones expressing animus as the motivation for her adverse evaluation and subsequent layoff. To be sure, Recinos' lack of candor does not preclude absolutely a conclusion that her evaluation, and her subsequent layoff arising as a result of it, had been unlawfully motivated. After all, the ultimate question as to those personnel actions centers on Respondent's actual motivation for them, *Norris/O'Bannon*, 307 NLRB 1236 (1992), and cases cited therein, not on the veracity of Recinos. Since Olvera and Olea credibly testified that the layoff selection had been based solely on her most recent performance evaluation, notwithstanding its upgrade in January 1991, and inasmuch as the objective evidence supports that testimony, the crucial question here is whether there is evidence that Olvera had evaluated her on some basis other than her work performance. A preponderance of the evidence does not support such a conclusion.

Recinos had never received so adverse an evaluation as the one given to her by Olvera on December 12, 1990. However, not only did Recinos, herself, not actually dispute Olvera's testimony that she was slow when working on the assembly line, but leadman Gallegos and ball retainer operator Elvira Aguayo confirmed Olvera's assertion that she was slow. In fact, Aguayo testified, and Recinos was never called to deny, that Recinos had worked slowly in the ball retainer department and, moreover, had said that she did not like working on the assembly line because, ''It was too heavy, to quick for her.'' Nor did Recinos dispute Olvera's testimony that, prior to Olvera's evaluation, operators ordinarily checked drawings before beginning work on the assembly line, but that she had failed to take such action to familiarize herself with the work that she would be doing.

With regard to the attitude category, Recinos did not contradict Olvera's testimony about friction among the ball retainer department employees. In fact, called upon during cross-examination to name the other workers involved in that friction, Olvera promptly did so. While Respondent produced every document sought by the General Counsel, some during the course of the hearing, at no point was evidence adduced showing that the identified ball retainer department employees had been rated any differently from Recinos concerning that attitude problem described, and complained about, by Olvera.

The interesting aspect of her grade in that particular category was Recinos references to statements by Olvera concerning her negative attitude toward Respondent. She portrayed that statement as, and may have truly perceived it to mean, a reference to her union sympathies. However, she did not contest Olvera's description of requests that she participate in the periodic festive gatherings intended to improve among employees ''positiveness that we all share together as a company.'' Her uncontroverted failure to do so could logically be construed as demonstrating the negative attitude toward the company that Olvera acknowledged having pointed out. Of course, some might not concur in that characterization and might even dispute the value on esprit de corps of such gatherings. But, that decision is a business one, not open to evaluation by the Board nor by its administrative law judges. See *Norris/O'Bannon*, supra.

The perhaps most significant category supporting the lawfulness of Olvera's evaluation is the one pertaining to dependability. Recinos immediately preceding evaluation, the one prepared by Jiminez in June 1990, reveals that she had accumulated 4.0 attendance points. But, as set forth above, she had accumulated 7.0 such points by the time of Olvera's evaluation. Since Respondent calculates those points by half points, that means that Recinos had been involved in six attendance infractions during the time between the two evaluations. Moreover, in that connection, she displayed a further lack of candor. On August 22, 1990, she had been given a verbal attendance counseling—in effect, a warning—because of the points that she had accumulated by that date. She testified initially that she had accumulated no additional attendance points thereafter. However, during cross-examination, it was pointed out that she had 7.0 points by December 1990, but that the counseling listed her total points as having been 6.5 as of August 22, 1990. Confronted with these undisputed point totals, Recinos conceded that she had, in fact, committed a further attendance infraction between the counseling and Olvera's evaluation. In addition, her rapid accumulation of attendance infraction points during the 6-month period between June and December 1990 tends to objectively show that Recinos' performance had been deteriorating since the preceding June evaluation.

In the foregoing circumstances, a preponderance of the credible evidence supports Respondent's position that Recinos had been lawfully evaluated in December 1990. Moreover, that she had been upgraded 1 month later does not undermine the evidence that her selection for layoff had been objectively made for lawful reasons. The upgrade had been somewhat tentative, with Olvera's testimony tending to show that it had been based more on hope than reality. Her most recent evaluation, even as upgraded, brought her within the ambit of Respondent's first category of employees to be selected for layoff: an employee whose performance had been unsatisfactory. Similarly situated employees were also placed in that category and laid off. To be sure, as the General Counsel argues with respect to some facets of Respondent's defense, there may be gaps in certain aspects of the evidence. But, a ''[r]espondent's defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it.'' *Merillat Industries*, 307 NLRB 1301 (1992). Therefore, I conclude that a preponderance of the credible evidence does not support the allegations that Respondent unlawfully withheld a merit pay increase from Recinos and unlawfully laid her off 2 months later.

That brings the matter back to where it started: with Cruz' remarks to employees during the preelection meetings. None of his testimony about what he had told them discloses an implied promise of benefits if they rejected representation by the Union. However, with regard to any negotiations that might occur should the Union prevail in the election, Cruz testified that he had told the employees,

> as far as negotiations are concerned, I said, ''Negotiations are a give-and-take situation.''
>
> I know I was getting feedback that some people were saying they were going to get a ten-dollar-an-hour raise, and a lot of people were believing that. And I said something along the lines, ''Yeah, that can be true, but, on the other hand, you could stay the same or you

> could even lose.'' I would say things like, ''If the union starts at the top, we'll start at the bottom.''
>
> . . . .
>
> I said that if the union were to ask for a five-dollar-an hour increase, as far as their first proposal, that there would be nothing wrong with the company offering a five-dollar-an-hour decrease. I said, ''If they start at the top, we would start at the bottom an find a common ground.''

Present as an observer at Cruz' meeting had been Olea. With regard to the subject of what Cruz had said about negotiations, Olea testified:

> When the subject was talked about, to the best of my recollection, it was posed: if we had an election and the union won the election, we would have to negotiate in good faith and bargain in good faith, and everything would start at the table. Now you could either lose wages or benefits or you could gain wages and benefits, or you could remain the same.

None of the foregoing statements ''[c]ould reasonably have been understood as a threat of loss of existing benefits.'' *Lear-Siegler Management Service*, 306 NLRB 393 (1992). Nor did they contain ''the seed of a threat that the employer will become punitively intransigent in the event the union wins the election.'' *Coach & Equipment Sales Corp*., 228 NLRB 440 (1977). Rather, they relate any possible decrease of wages and benefits—as well as any possible increase of them—to ''the normal give and take of negotiations.'' *Taylor-Dunn Mfg. Co*., 252 NLRB 799, 800 (1980), enfd. 810 F.2d 638 (9th Cir. 1982). Employers are permitted to ''reasonably communicate[] the views that a union cannot compel concessions in negotiations and that a union cannot guarantee the retention of all present benefits because such benefits are subject to negotiations.'' *Pillod of Mississippi*, 275 NLRB 799, 800 (1985). Inasmuch as there is no credible evidence of other unlawful threats or promises by Cruz, there is no basis for concluding that the foregoing statements violated the Act because they were veiled threats to withdraw existing benefits in the context in which they were uttered. Therefore, I conclude that a preponderance of the credible evidence does not support the allegations of unlawful statements attributed to Cruz during September and October 1990.

CONCLUSION OF LAW

Accuride Division of Standard Precision, Inc. has not violated the Act in any manner alleged in the consolidated amended complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

It is hereby ordered that the consolidated amended complaint be, and it hereby is, dismissed in its entirety.

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.